

NO. 48612-1

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent.

v.

PAVEL F. ZALOSH,

Respondent.

Appeal from Superior Court of Clark County
Honorable David Gregerson
NO. 12-1-01105-2

BRIEF OF APPELLANT

Joel Penoyar, WSBA #6407
Edward Penoyar, WSBA #42919
Attorneys for Defendant/Appellant

Post Office Box 425
South Bend, Washington 98586
(360) 875-5321

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENTS OF ERROR	2
III.	STATEMENT OF CASE	2
IV.	SUMMARY OF ARGUMENT	5
V.	LEGAL ARGUMENT	5
A.	The trial court erred in finding that there was sufficient evidence to support a finding of accomplice liability for the residential burglary of the Mowrey home and for theft of Mowrey's firearm. No evidence was presented that defendant burglarized or aided a burglary of the Mowrey home except a video of unidentifiable individuals near the home and defendant's possession of Mowrey's backpack several days later. Furthermore, there was no evidence connecting the disappearance of the firearm to the burglary.	5
1.	LAW	5
a)	Standard of Review	6
b)	Residential Burglary	7
c)	Accomplice Liability	7
d)	Circumstantial Evidence	9
2.	ANALYSIS	9
B.	The trial court erred in finding that there was sufficient evidence supporting a conviction of Possession of Stolen Property in the Second Degree from the Lucaci and Powell homes; it was not shown that the property's value exceeded \$750.	11
1.	LAW	11
2.	ANALYSIS	12
C.	In the alternative, a new trial should be granted because the trial court erred during the portion of the trial regarding the Lucaci and Powell homes when it failed to undertake a ER 404(b) relevance analysis as	

	required by <i>State v Jackson</i> . When the State attempted to introduce evidence as to how the homes were entered, burglaries for which defendant was not charged, Defense counsel timely objected yet the presiding judge overruled the objection with no comment whatsoever.	13
1.	LAW	13
2.	ANALYSIS.....	15
VI.	CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases

<i>State v. Aiken</i> , 72 Wash.2d 306, 349, 434 P.2d 10 (1967).....	8
<i>State v. Cronin</i> , 142 Wn.2d 568, 578–79, 14 P.3d 752 (2000).....	8
<i>State v. Darden</i> , 145 Wn.2d 612, 619, 41 P.3d 1189 (2002).....	6
<i>State v. Donckers</i> , 200 Wn. 45, 93 P.2d 355 (1939).....	9
<i>State v. Engel</i> , 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).....	6
<i>State v. Foxhoven</i> , 161 Wn.2d 168, 174, 163 P.3d 786 (2007)	14
<i>State v. Gosby</i> , 85 Wn.2d 758, 766, 539 P.2d 680 (1975).....	9
<i>State v. Hammond</i> , 6 Wash.App. 459, 461, 493 P.2d 1249 (1972)	11, 13
<i>State v. Hiser</i> , 51 Wn.2d 282, 317 P.2d 1072 (1957)	9, 10
<i>State v. Holcomb</i> , 180 Wash.App. 583, 590, 321 P.3d 1288, review denied, 180 Wn.2d 1029, 331 P.3d 1172 (2014)	8
<i>State v. Homan</i> , 181 Wn.2d 102, 105, 330 P.3d 182 (2014)	6
<i>State v. Jackson</i> , 102 Wash.2d 689, 694, 689 P.2d 76 (1984)....	2, 4, 14, 16
<i>State v. Kleist</i> , 126 Wn.2d 432, 895 P.2d 398 (1995).....	11
<i>State v. Miller</i> , 179 Wn. App. 91, 105, 316 P.3d 1143 (2014)	6
<i>State v. Quismundo</i> , 164 Wn.2d 499, 504, 192 P.3d 342 (2008).....	6
<i>State v. Roberts</i> , 142 Wn.2d 471, 512, 14 P.3d 713 (2000).....	8
<i>State v. Smith</i> , 106 Wn.2d 772, 725 P.2d 951 (1986).....	14, 15
<i>In re Wilson</i> , 91 Wn.2d 487, 492, 588 P.2d 1161 (1979)	8

Statutes

RCW 9.41.010	10
RCW 9A.08.020.....	6, 7
RCW 9A.52.025.....	6
RCW 9A.56.010.....	10, 11
RCW 9A.56.160.....	10

Rules

CrR 7.5	13
ER 404(b)	1, 2, 13

I. INTRODUCTION

Pavol Zalozh appeals his conviction of residential burglary of the Mowrey home, theft of Mowrey's firearm, and his two convictions of possession of stolen property from the Lucaci and Powell homes.

Zalozh was convicted of residential burglary of the Mowrey home under accomplice liability, even though the only evidence that exists that he in any way aided in a burglary was a video of unidentifiable individuals and his possession of Mowrey's backpack several days later. He was also convicted of theft of a firearm from the Mowrey home, though there was no evidence connecting the disappearance of the firearm, the existence of which was based only on testimony, to the alleged burglary.

Regarding his conviction of possession of property from the Lucaci and Powell homes, insufficient evidence was presented at trial as to the present and local fair market value of any goods stolen, and therefore the conviction for Possession of Stolen Property in the Second Degree, which requires value above \$750, cannot be established and should therefore be remanded.

Finally, in the alternative, Zalozh requests a new trial related to the Possession charges because improper evidence was admitted of 'other crimes' in violation of ER 404(b) and thus the presiding judge committed an error of law. At trial, the State began to submit evidence as to how the Lucaci and Powell homes were entered, yet Zalozh was not charged with burglary of those homes. Upon defense counsel's timely objection, the trial court failed to undergo the mandatory analysis of relevance as required by

the Supreme Court in *State v Jackson*. The Court simply overruled with no comment whatsoever.

II. ASSIGNMENTS OF ERROR

A. The trial court erred in finding that there was sufficient evidence to support a finding of accomplice liability for the residential burglary of the Mowrey home and for theft of Mowrey's firearm. No evidence was presented that defendant burglarized or aided a burglary of the Mowrey home except a video of unidentifiable individuals near the home and defendant's possession of Mowrey's backpack several days later. Furthermore, there was no evidence connecting the disappearance of the firearm to the burglary.

B. The trial court erred in finding that there was sufficient evidence supporting a conviction of Possession of Stolen Property in the Second Degree from the Lucaci and Powell homes; it was not shown that the property's value exceeded \$750.

C. The trial court erred during the portion of the trial regarding the Lucaci and Powell homes when it failed to undertake a ER 404(b) relevance analysis as required by *State v Jackson*. When the State attempted to introduce evidence as to how the homes were entered, burglaries for which defendant was not charged, Defense counsel timely objected yet the presiding judge overruled the objection with no comment whatsoever.

III. STATEMENT OF CASE

Defendant Pavel Zalozh appeals his convictions at trial related to (1) Residential Burglary of the home of John Mowrey and Theft of a Firearm

(Mowrey's), and (2) Possession of Stolen Property from the homes of a) Liviu and Silvia Lucaci and b) Scott and Kyong Cha Powell. Defendant was not charged with burglary of the Lucaci and Powell homes. The Mowrey burglary happened on June 2, 2012, and the possession of stolen property occurred one week later on June 11, 2012. This appeal is based on insufficient evidence for the burglary conviction, theft of a firearm, and for the value of the property in the possession charges. It is also based on the trial court's admission of improper evidence relating to the possession charges.

The trial for these charges was in December 2015, following a long appeal process concerning suppression issues unrelated to the present appeal and Defendant's failures to appear. He was additionally charged and convicted at this trial of Theft in the First Degree and Bail Jumping.

Defendant Zalozh was tried and convicted of Residential Burglary of the Mowrey home based on accomplice liability. This was presumably due to the lack of evidence in general. In fact, the primary evidence at trial regarding the burglary was (1) a surveillance video of unidentifiable individuals near (but not in or at) the Mowrey home (VRP 211-212¹), (2) defendant's possession of Mowrey's backpack and firearm some days later (VRP 202) and (3) gloves found in the backpack that were not Mowrey's (VRP 127) and (4) the fact that no fingerprints were found at the burglarized

¹ DIRECT BY HARVEY OF BUTLER

Q. Were you able to identify anybody from the video?

A. No."

home (VRP 199). The only evidence submitted regarding the video was that the individuals walking may have been male, and they appeared to have backpacks on (VRP 211). The only evidence that Mowrey had a firearm was his own testimony; no firearm was ever entered into evidence (VRP 239). No evidence was submitted that the firearm disappeared at the burglary or that it was Zallozh and not another individual who stole it.

Zallozh was later found to be in possession of stolen property from the Lucaci and Powell homes. Zallozh appeals his conviction for possession specifically with regards to the fact that it was in the Second Degree (above \$750.00). As addressed below, the testimony at trial regarding the valuation of the property above \$750.00 consisted entirely of the owners' speculations, failing to address the statutorily-required issue of the property's geographical valuation.

During the Lucaci and Powell portions of the trial, the State attempted to present evidence as to the method of entry into their homes. Trial defense counsel timely objected on the grounds that evidence of other crimes pursuant to ER 404(b) was prejudicial and not relevant. As discussed in argument below, the presiding judge overruled with no comment whatsoever, in violation of strict standards required by *State v Jackson*.

After the conclusion of the trial and finding of guilt were entered, trial defense counsel submitted and argued a motion for arrest of judgment and new trial, which included, among others, many of the issues set forth in

this appeal. The court denied his motion and, after sentencing, this appeal began.

IV. SUMMARY OF ARGUMENT

This appeal is based on insufficient evidence for the burglary conviction, theft of a firearm, and for the value of the property in the possession charges. It is also based on an alternative argument regarding the trial court's admission of improper evidence relating to the possession charges.

V. LEGAL ARGUMENT

- A. The trial court erred in finding that there was sufficient evidence to support a finding of accomplice liability for the residential burglary of the Mowrey home and for theft of Mowrey's firearm. No evidence was presented that defendant burglarized or aided a burglary of the Mowrey home except a video of unidentifiable individuals near the home and defendant's possession of Mowrey's backpack several days later. Furthermore, there was no evidence connecting the disappearance of the firearm to the burglary.**

1. LAW

Even in the light most favorable to the state, the trial court made an error of law by finding sufficient evidence as to accomplice liability for burglary. As set forth below, accomplice liability requires proof of something more than mere presence and awareness—it requires proof of aid. Here, there is no evidence whatsoever that Zalozh aided in the burglary, in fact, there is no evidence that he was even present at the scene. No reasonable trier of fact could have come to the conclusion that 'sufficient' evidence existed.

a) *Standard of Review*

Evidentiary rulings are reviewed on appeal for an abuse of discretion by the trial court. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). An abuse of discretion occurs where a trial court's decision is manifestly unreasonable or made for untenable reasons.² *Id.* A trial court necessarily abuses its discretion when basing its ruling on an error of law. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008).

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014); *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In a sufficiency of the evidence challenge, Zallozh admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Homan* at 106. Appellate courts do not review credibility determinations. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014). The appellate court considers circumstantial and direct evidence as equally reliable. *Miller* at 105.

///

//

/

² "Abuse of discretion" is a time-honored phrase that has little but time to honor it. Actions by trial judges that could rationally be described as an "abuse" of anything are extremely rare. The "abuse" standard is properly viewed as mere legal shorthand for a type of legal mistake.

b) Residential Burglary

RCW 9A.52.025: (1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

c) Accomplice Liability

The prosecution in this matter alleged guilt based on accomplice liability:

MR. HARVEY [State]: Yeah, the bracket did not seem to fit the State's theory of the case, which is that -- we don't know who did what inside the house, so the theory is of course that both people were present for the commission of the crime.

See, VRP 303.

As stated, there was a complete lack of evidence, much less 'sufficient' evidence, to show that Zalozh was an accomplice. At most, a trier of fact could come to the conclusion that Zalozh was present at the scene; but that is not sufficient to prove accomplice liability.

A person may be liable for the acts of another if he or she is an accomplice. RCW 9A.08.020(1), (2)(c). A person is an accomplice of another person in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she aids or agrees to aid such other person in planning or committing it. RCW 9A.08.020(3).

"But, the accomplice liability statute has been construed to apply solely when the accomplice acts with knowledge of the specific crime that is eventually charged, rather than with knowledge of a different crime or generalized knowledge of criminal activity." *State v. Holcomb*, 180 Wash.App. 583, 590, 321 P.3d 1288, review denied, 180 Wn.2d 1029, 331

P.3d 1172 (2014); *State v. Cronin*, 142 Wn.2d 568, 578–79, 14 P.3d 752 (2000); *State v. Roberts*, 142 Wn.2d 471, 512, 14 P.3d 713 (2000). “And the required aid or agreement to aid the other person/must be ‘in planning or committing [the crime].’” *Holcomb* at 590 (quoting RCW 9A.08.020(3)(a)(ii)).

“Something more than presence alone” must be shown to establish that a person is an accomplice. *In re Wilson*, 91 Wn.2d 487, 492, 588 P.2d 1161 (1979). Physical presence and awareness of the transaction alone are insufficient to establish accomplice liability. *Id.* at 491. In *Wilson*, the Supreme Court discussed in detail what ‘more than mere presence’ means:

The juvenile court held and the Court of Appeals confirmed that in the context of the juvenile activity described above, Wilson's knowing presence was a sufficient act to permit the court to find him to be an accomplice to the crime of reckless endangerment. This cannot be. Even though a bystander's presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt. It is not the circumstance of “encouragement” in itself that is determinative, rather it is encouragement plus the intent of the bystander to encourage that constitutes abetting. We hold that something more than presence alone plus knowledge of ongoing activity must be shown to establish the intent requisite to finding Wilson to be an accomplice in this instance. *Id.* at 492.

Presence at the scene of an ongoing crime may be sufficient if a person is “ready to assist”. *State v. Aiken*, 72 Wash.2d 306, 349, 434 P.2d 10 (1967). The Court in *Wilson* described what this specifically means:

One does not aid and abet unless, in some way, he associates himself with the undertaking, participates in it as in something he desires to bring about, and seeks by his action to make it succeed. *State v. Gladstone*, (78 Wash.2d 306, 474 P.2d 274, 42 A.L.R.3d 1061 (1970)); *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 93 L.Ed. 919 (1949). Mere knowledge or physical presence at the scene of a crime neither constitutes a crime nor will it support a

charge of aiding and abetting a crime. *State v. Gladstone*, supra; *State v. Dalton*, 65 Wash. 663, 118 P. 829 (1911).

d) Circumstantial Evidence

Because there was no direct evidence of the Mowrey firearm or Zalozh's involvement in its disappearance, the court relied on circumstantial evidence. The purported firearm was not entered into evidence, and its existence was exclusively based on Mowrey's testimony alone. The Supreme Court has stated "[i]t is simply untenable to assume that circumstantial evidence is less reliable than is direct evidence." *State v. Gosby*, 85 Wn.2d 758, 766, 539 P.2d 680 (1975). However, circumstantial evidence is also subject to proof beyond a reasonable doubt as much as direct evidence. *Id* at 761. Circumstances themselves must be proved and not assumed. *State v. Donckers*, 200 Wn. 45, 93 P.2d 355 (1939). One may not fill weaknesses or gaps in the proof by suspicion, speculation or surmise. *State v. Hiser*, 51 Wn.2d 282, 317 P.2d 1072 (1957).

2. ANALYSIS

Here, the trial court abused its discretion and committed an error of law when it found there was sufficient evidence supporting accomplice liability for the crime of burglary. No reasonable trier of fact, viewing the evidence in the light most favorable to the State, could have found that evidence existed that Zalozh aided in the burglary of the Mowrey home.

Incriminating evidence was simply nonexistent. The only direct evidence presented was (1) a black and white video of two unidentifiable people walking near the Mowrey home. No individual or personal characteristics could be discerned except for the fact that they seemed male,

both had a backpack, and (2) defendant was found to be in possession of the Mowrey's backpack some days later. (VRP 202.) No evidence was submitted of any witnesses to Zallozh entering, exiting, or even approaching the home. No fingerprints were found in the home. (VRP 199.)

Even if a reasonable trier of fact could somehow speculate that Zallozh was the individual in the video because he had the Mowrey backpack a few days later, that would show only mere presence or knowledge of burglary and not the "something more" of aid or assistance that is required in the statute and in *Wilson*. In other words, two males who could have been burglars were filmed at the Mowrey home and days later Zallozh had an item taken from the Mowrey home—that is it.

Mowrey presented no evidence that the gun existed, that it was lost at the time of the burglary, or that it was Zallozh and not anyone else who took it. (VRP 239.) The only evidence that the firearm even existed was Mowrey's own testimony that he had such weapons. (VRP 123.) While the State may argue that the lack of direct evidence relating to the firearm is superseded by circumstantial evidence created by Mowrey's testimony, it clearly cannot be shown beyond a reasonable doubt that Zallozh was the thief. These circumstances are entirely speculation and surmise as forbidden by *Hiser*. It is reasonable to doubt whether Mowrey had those guns, whether he may have lost them due to his own fault, or whether it was one of the unidentified males in the video that took the firearm. In fact, because the other items of Mowrey were all recovered, that would seem to imply that the firearm was not stolen.

B. The trial court erred in finding that there was sufficient evidence supporting a conviction of Possession of Stolen Property in the Second Degree from the Lucaci and Powell homes; it was not shown that the property's value exceeded \$750.

1. LAW

RCW 9A.56.160 Possessing stolen property in the second degree—Other than firearm or motor vehicle. (1) A person is guilty of possessing stolen property in the second degree if: (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value;...

RCW 9A.56.010(21): "Value" means the market value of the property or services at the time and in the approximate area of the criminal act.

"Market value" is defined in this state as the price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction. *State v. Kleist*, 126 Wn.2d 432, 895 P.2d 398 (1995). It is longstanding and well-established that a property owner may testify as to the property's market value without being qualified as an expert. *State v. Hammond*, 6 Wash.App. 459, 461, 493 P.2d 1249 (1972) (citing *McCurdy v. Union Pac. R.R.*, 68 Wash.2d 457, 413 P.2d 617 (1966)). However, "[t]he weight of such testimony is another question and may be affected by disclosures made upon cross-examination as to the basis for such knowledge, but this will not disqualify the owner as a witness." *Hammond* at 461.

2. ANALYSIS

Here, the only evidence submitted that the value of the property stolen from the Lucacis' was above \$750 was testimony that they paid \$1,200 for the rings 25 years prior. See VRP 152:

DIRECT BY HARVEY/LUCACI, S.

Q. And how do you come to that number of 1,200?

A. When we bought them, I remember how much we paid for 8 them right now.

That is not enough to show current value over \$750.

RCW 9A.56.010(21) is unequivocal that "value" is the value "at the time **and in the approximate area of the criminal act.**" [Emphasis added.] This creates a two-fold requirement for the State to prove beyond a reasonable doubt: (1) the value at the time of the criminal act, **and** (2) the value in the approximate area. Ignoring those two requirements and simply providing evidence of their value 25 years prior at an unspecified location does not satisfy the statute and constitutes insufficient evidence.

Similarly, the only evidence that the value of the property stolen from the Powell's was above \$750 was Mr. Powell's vague and speculative testimony that the total value of his jewelry was \$1,190, the majority of which was a guess that the gold charm was worth \$500. See VRP 195-196:

BY MR. DOWNS:

Q. You're estimating that if you had to purchase that gold piggy charm new in the store, it would be roughly 500?

A. Yeah. Again I'm not a jewelry appraiser, but, you know, it's like -- it's like a work of art, and they have to make it, and they put it in the window, and they're paying for the rent. I don't know what they're going to charge for it.

Q. Okay.

A. But just the gold value alone it was worth 360 by the weight.

Q. Okay. So it's just a guess it would be possibly a little bit more because of the craftsmanship that has to go into it?

RECROSS BY DOWNS/POWELL, S.

A. Yes.

No objective evidence as to the weight or current price of gold was provided by anyone, and Mr. Powell even admitted that he was not a jeweler, which pursuant to *Hammond*, calls into question the reliability of his testimony, despite being an owner. Where, as here, the standard on appeal is beyond a reasonable doubt, this evidence cannot support a finding of a value of more than \$750.00.

In sum, these two convictions should therefore be remanded for proper sentencing under Possession of Stolen Property in the Third Degree.

C. In the alternative, a new trial should be granted because the trial court erred during the portion of the trial regarding the Lucaci and Powell homes when it failed to undertake a ER 404(b) relevance analysis as required by *State v Jackson*. When the State attempted to introduce evidence as to how the homes were entered, burglaries for which defendant was not charged, Defense counsel timely objected yet the presiding judge overruled the objection with no comment whatsoever.

1. LAW

Under ER 404(b), admissibility of evidence of 'other crimes' is scrutinized carefully by the courts and under clearly established and rigorously applied standards that did not happen here.

CrR 7.5 provides one of the grounds for a new trial:

(a) The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...

(6) Error of law occurring at the trial and objected to at the time by the defendant;

ER 404 (b) addresses the use of evidence of other crimes at trial:

Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Appellate courts review the trial court's interpretation of ER 404(b) *de novo* as a matter of law. *State v. Foxhoven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). If the trial court interprets ER 404(b) correctly, appellate courts review the trial court's ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* A trial court abuses its discretion where it fails to abide by the rule's requirements. *Id.*

A trial court must undergo a thorough relevancy analysis at trial before evidence of other acts can be admitted. *State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984). If the court fails to undergo this analysis, an error of law has been committed. *Id.*

The requirements of this analysis are set forth below from *State v. Smith*, 106 Wn.2d 772, 725 P.2d 951 (1986):

In *Saltarelli*, this court defined the analysis a trial court must employ before admitting evidence of other crimes. First, the court must identify the purpose for which the evidence is to be admitted. *Saltarelli*, 98 Wash.2d at 362, 655 P.2d 697. **953 Second, the court must determine the relevancy of the evidence. In determining relevancy, (1) the purpose for which the evidence is offered "must be of consequence to the outcome of the action", and (2) "the evidence must tend to make the existence of the identified fact more ... probable." *Saltarelli*, at 362-63, 655 P.2d 697. Third, after the court has determined relevancy, it must then "balance the probative

value against the prejudicial effect ...” (Italics ours.) *Saltarelli*, at 363, 655 P.2d 697. As stated in *State v. Bennett*, 36 Wash.App. 176, 180, 672 P.2d 772 (1983), “[i]n doubtful cases the scale should be tipped in favor of the defendant and exclusion of the evidence.

In *Smith*, the Supreme Court stressed the substantial danger posed by evidence of other crimes:

ER 403 requires exclusion of evidence, even if relevant, if its probative value is substantially outweighed by the danger of unfair prejudice. See *State v. Goebel*, supra. As stated in *State v. Coe*, 101 Wash.2d 772, 780–81, 684 P.2d 668 (1984), “[c]areful consideration and weighing of both relevance and prejudice is particularly important in sex cases³, where the potential for prejudice is at its highest.”

Smith is factually similar to the present case, in that evidence of burglary was also offered at trial, when the defendant was not charged with that crime. The court made it clear that it must undergo the analysis set forth above to determine the relevancy of the burglary evidence: “As stated above, *Saltarelli* requires that we identify the purpose for which the burglary evidence was offered.” *Smith* at 777.

2. ANALYSIS

Here, the record is clear that trial court unequivocally failed to undergo the ‘careful and thoughtful’ three-part analysis required by the Supreme Court in *State v. Jackson*. As soon as the State began to address how the Lucaci and Powell homes were entered, the following occurred:

MR. DOWNS: Your Honor, I'm going to object on relevance grounds. It's not something that's charged in this case. It's only a matter of whether property was stolen.

THE COURT: Overruled. Relevance? Relevance is the objection?

³ The heightened consideration mentioned here in sex crimes does not obviate application of the same rule in all cases.

MR. DOWNS: That's correct.

THE COURT: Overruled.

(VRP 199-200.) This was the only portion of the VRP that related to the 'probative vs prejudicial' analysis. This exchange shows that no analysis was made by the court whatsoever, in direct violation of *Jackson*. After defense counsel timely objected, the State submitted nothing as to why the evidence should be admitted.

It cannot be argued that this is a harmless error because it cannot be questioned that evidence of burglary, at a trial for another burglary, strongly implies that the defendant was the same burglar. There is no way around this implication. In fact, it is very likely, and not at all obvious, that the trial court, had it undergone the required analysis, would have come to the conclusion that the burglary evidence was not relevant.

VI. CONCLUSION

The conviction for residential burglary and theft of a firearm should be reversed based on insufficient evidence. The possession charge should also be remanded because there was insufficient evidence that it constituted possession in the second degree as its value was not sufficiently shown. In the alternative, a new trial should be granted for the possession charges based on the trial court's admission of improper evidence.

Respectfully submitted this 21st day of July, 2016.

By: /s/ *Edward Penoyar*

EDWARD PENOYAR, WSBA #42919

edwardpenoyar@gmail.com

Counsel for Appellant Zalozh

P.O Box 425

South Bend, WA 98586

(360) 875-5321

DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that on the date below I personally caused the foregoing document to be emailed to the following:

Anne Cruser
Clark County Prosecutor's Office
PO Box 5000
Vancouver, WA 98666-5000
anne.cruser@clark.wa.gov

and a copy mailed, postage prepaid to the defendant:

Pavel Zalozh, DOC #353493
Airway Heights Corrections Center
PO Box 1899
Airway Heights, WA 99001-1899

DATED this 21st day of July, 2016, South Bend, Washington.

/s/ Tamron Clevenger
TAMRON CLEVINGER, Paralegal
to Joel Penoyar & Edward Penoyar
Attorneys at Law
PO Box 425
South Bend, WA 98586
(360) 875-5321
tamron_penoyarlaw@comcast.net

EDWARD PENOYAR, ATTORNEY AT LAW

July 21, 2016 - 5:35 PM

Transmittal Letter

Document Uploaded: 7-486121-Appellant's Brief.pdf

Case Name: State v. Zalozh

Court of Appeals Case Number: 48612-1

Is this a Personal Restraint Petition? Yes ☐ No ☒

The document being Filed is:

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

☒ Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Tamron M Clevenger - Email: tamron_penoyarlaw@comcast.net

A copy of this document has been emailed to the following addresses:

anne.cruser@clark.wa.gov

edwardpenoyar@gmail.com

tamron_penoyarlaw@comcast.net